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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-6713

ORIGINAL COPY

ANN KEYES

Appellant

vs.

STATE OF OKLAHOMA DEPARTMENT OF INSTITUTIONS,
SOCIAL AND REHABILITATIVE SERVICES, and
L. E. RADER, Director of the Department
of Institutions, Social and Rehabilitative Services

Appellees

IN THE MATTER OF: KEYES, DERRICK
A child under 18 years of age,
to-wit: 2 1/2 years.

# MOTION TO AFFIRM

J. HARRY JOHNSON

AND

DONALD LEE RITTER
ATTORNEYS FOR APPELLEES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-6713

ANN KEYES,

Appellant,

vs.

STATE OF OKLAHOMA DEPARTMENT OF INSTITUTIONS, SOCIAL AND REHABILITATIVE SERVICES and L. E. RADER, Director of the Department of Institutions, Social and Rehabilitative Services,

Appellees,

IN THE MATTER OF: KEYES, DERRICK, a child under 18 years of age, to-wit: 2 1/2 years

## MOTION TO AFFIRM

Pursuant to Rule 16, of the Revised Rules of this Court, Appellees move that the judgment of the Supreme Court of the State of Oklahoma be affirmed.

## JURISDICTION

This is a direct appeal from a final judgment of the Oklahoma Supreme Court entered on December 20, 1977, rehearing denied February 8, 1978, which upheld the constitutional validity of State statutes regulating termination of parental rights and affirmed the Trial Court's decision in terminating parental rights of Appellant herein. Notice of appeal was filed on May 4, 1978, with jurisdiction of this Court being invoked under 28 U.S.C. 1257(2).

## QUESTION PRESENTED

Does the statutory procedure of Oklahoma permitting termination of parental rights under specific circumstances violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States as applied to Appellant?

## STATUTES AND RULING INVOLVED

The Oklahoma statute involved in 10 O.S. Supp. 1977, §1130 (then in effect), which is set out, infra, as "APPENDIX ONE." The ruling herein challenged is set out, infra, as "APPENDIX TWO."

## STATEMENT OF FACTS

On January 5, 1974, an eleven (11) month old child, Derrick Keyes, while in the care and custody of Appellant, was admitted to a hospital in the City of Tulsa, State of Oklahoma, suffering from hypernatremia, severe anemia, pneumonia, dehydration, and vomiting. Subsequent inquiry as to the cause of the condition led to the filing of a Petition in the District Court of Tulsa County on January 18, 1974, in which the State alleged the child to be dependent-neglected at the hands of his parents; that the child's environment was injurious to his health and welfare; and that Appellant had allowed the child to become malnourished and convulsive, and to remain so without medical treatment. Emergency custody was vested in Appellee. A hearing was scheduled for adjudicatory determination of the merits of the allegations. After unchallenged continuances, Appellant appeared before the Court, represented by counsel; evidence was heard and, on May 15, 1974, the allegations were sustained and the child was made a ward of the Court with custody removed from Appellant and vested in Appellee. One custody review hearing was held on July 17, 1974; another on September 4, 1974; and custody remained with Appellee. Finally, on March 19, 1975, the Trial Court re-invested temporary custody in Appellant, subject to supervision of Appellee and review by the Court.

On September 20, 1975, the child, then age two years and seven months, while under the care and custody of Appellant, was admitted to a hospital in the City of Tulsa, State of Oklahoma, suffering from a perforated colon and severely lacerated rectum, which injuries appeared to be consistent with anal abuse. Sub-

uent to inquiry thereon, the State filed a Motion setting th the known facts and circumstances, alleging that the ents had failed to correct the conditions resulting in the ginal adjudication of dependency and neglect, and praying termination of parental rights pursuant to 10 O.S. Supp. 7, §1130(A)(3)(a) and (c), the pertinent sections of the tute here challenged. Notice issued and a hearing was eduled for November 3, 1975.

At that hearing, the Appellant appeared, with counsel, the natural father appeared, but without counsel. Evi- ce was taken and the hearing was continued to December 8, 5, in order to allow the father an opportunity to obtain nsel to represent his interest. On December 8, 1975, the rt Referee found, after hearing testimony and evidence, t the conditions that had existed had not changed, that child's physical health continued to be in jeopardy and t it was necessary for the proper care and protection of child and in his best interests that all parental rights the natural parents be terminated and that the child be ced into the permanent custody of Appellee.

Counsel for both the natural mother and the natural father ected in a timely fashion to the findings of the Referee; after a series of continuances, the matter of those ob- tions came on before the Associate District Judge presiding r the Juvenile and Family Relations Division of the Court April 15, 1976. As a result of that hearing, the Court ered the following Order, after noting appearances of the rties and their Attorneys:

> "The Court has received transcripts of the previous hearings held by the Court Referee, Helen Kannady, on termination of parental rights for both natural parents and has read the same prior to today's hearing. The Court hears formal argument in support of the objections of the natural mother and the objections of the natural father to termination of parental rights by Court Referee, Helen Kannady. The Court determines that the natural parents have failed to show that any prejudicial errors of law were committed by the Court Referee and have failed to satisfy the Court that the findings and recommendations of the Referee for termination of parental rights are contrary to the testimony and evidence admitted in the previous hearings. The Court determines

that the recommendations of termination of parental rights of the natural parents is in the best interest of the child and that said termination is necessary to protect the child's physical and mental well-being.

"IT IS THEREFORE ORDERED that the findings and the recommendations of the Referee heretofore submitted to the Court on December 8, 1975, are confirmed and become the Order of this Court."

Thereafter, on May 17, 1976, both the natural mother and natural father filed their independent appeals before the ahoma Supreme Court.

On December 20, 1977, the Oklahoma Supreme Court affirmed termination of parental rights and, after extensive review the evidence and the application of the governing statute, d that the termination statutes were neither unconstitutional- vague, overly broad, nor couched in terms that have no com- meaning; noting explicitly that ". . .in the instant case, both the original Petition filed January 18, 1974, and the tion regarding termination filed September 23, 1975, both the ctual basis for termination and the legal standards permitting ne were set forth clearly and precisely and that Appellants d adequate and fair warning of what parental conduct was found be at issue - - care and protection necessary for the child's ysical health." (at p. 1029 of Matter of Keyes, Okl. 574 P2d 26)

## ARGUMENT

It is without doubt that this Honorable Court has long cognized that freedom of personal choice in matters of mar- age and family life is one of the liberties protected by the e Process Clause of the Fourteenth Amendment (Cleveland Board Education v. La Fleur, 94 S. Ct. 791 at p. 796) and that ere is a right to be free from unwarranted governmental in- sion into matters so fundamentally affecting a person isenstadt v. Baird, 92 S. Ct. 1029 at p. 1038).

Notwithstanding the absolute validity of the liberties phasized above, it has also been cardinal with this Honorable urt that the family unit is not beyond regulation in the

ic interest (Reynolds v. United States, 10 S. Ct. 299) are the rights of parenthood beyond limitation by the er exercise of valid State police power (Prince v. achusetts, 64 S. Ct. 438 at p. 442). For instance, it been held that a right to practice religion does not in- e a liberty to expose a child to ill health or death me, supra). Thus posed, the Court's, in scrutiny of pts by states to infringe upon the family, are squarely ronted by the competing interests of parental liberty, State's interest in protecting children from harm, and the n silent interest of the child.

In its efforts to balance these competing interests, this t has set forth the basic principle that States, in the cise of their inherent power regarding children, may not issibly enact governing legislation which needlessly nges upon the parent's constitutional liberties, nor may States create permanent, irrebuttable presumptions without fit of individualized determination of fitness or conduct he parent found to be injurious to a child's welfare. As d in Cleveland, such a statute was declared violative of process in Stanley v. Illinois, 92 S. Ct. 1208, and such umptions are disfavored, citing Vlandis v. Kline, 93 S. Ct. . But, even in Stanley, this Court did not question the rtion that neglectful parents may be separated from their dren or that a State's efforts to protect the moral, ional, mental and physical welfare of children are legiti- interests "well within the power of the State to imple- t." It is not the end, but rather the means utilized to ituate the legitimate purpose that the Court views with ict regard.

To that issue, Appellee asserts that Oklahoma has achieved necessary balance of competing interests and has cast its erning legislation in terms which assure due process to all ties involved and prevents any arbitrary or unwarranted in- sion into the family unit. As applied in the instant case,

ant was fully apprised of the necessity and duty to pro-
are and protection to the infant child and to so conduct
f to assure such care and protection. Full and open
tiary and appellate hearings were conducted over a four
eriod, with Appellant represented by competent counsel
ery step of the proceedings, and it was finally determined
ner interests and liberties must yield to the rights and
ests of the child to be safe in its infant person. Due
ss was served and the balance weighed appropriately.

## CONCLUSION

Appellant has asserted, in essence, that a substantial
al question is at issue herein because her rights of parent-
were terminated. Appellee avers that the Trial Court and
upreme Court of Oklahoma gave close scrutiny to the
enged statutes and the facts and circumstances giving rise
eir utilization, and decided the matters under the guide-
noted above. Accordingly, a full hearing of this matter,
ding Briefs and oral agrument is not necessary to a proper
ion by this Court. Appellees request that the judgment of
klahoma Supreme Court be AFFIRMED.

Respectfully submitted

J. HARRY JOHNSON, GENERAL COUNSEL

DONALD LEE RITTER, STAFF ATTORNEY

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and Rehabilitative Services
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FILED
SUPREME COURT
FEB 8 1978
s M. Lillard, Jr.
CLERK

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, February 8, 1978

IE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

9,278 Bruce B. Thompson and John T. Thompson v. Coleen Foss.
Certiorari denied.

8,885 Bill M. Weaver v. Ron Mize, Acting Director, Building Inspection Department.
Rehearing denied.

9,140 LVO Federal Credit Union v. Torchy Jane Wolfe, formerly Bellows; Richard A. Wolfe and Oklahoma Morris Plan; and Tulsa Abstract & Title Company.
Rehearing denied.

9,303 Catherine Hitchcock v. G.C. Ledyard, Jr., Trustee et al.
Certiorari denied. Withdrawn from publication.

9,439 In The Matter Of Estate Of Paul E. Brannon, Dec. Michael Joseph Brannon v. Paul D. Brannon.
Certiorari denied.

9,717 In The Matter Of: Keyes, Derrick, a child under 18 years of age.
Motion for oral argument and application for leave to appear and to file brief Amicus Curiae denied.
Motion for oral argument and petition for rehearing denied.

9,718 In The Matter Of: Keyes Derrick, a child under 18 years of age to-wit 2 1/2 years.
Motion for oral argument and petition for rehearing denied.

9,759 Kenneth M. Sloan and Mary A. Sloan v. Ben Owen, d/b/a Ben Owen Building Company.
Application for attorney fees denied.

,553 Central Oklahoma Sanitary Landfill, Inc. v. City Of Oklahoma City et al. (Coleman et al attempted Intervenors).
Clerk Of The Supreme Court is directed to file petition for certiorari tendered by Coleman et al, the same having been approved for filing by the Court this date.

,578 Bailey M. Smith and Dick Workman v. Glen's, Inc. and Glen R. Eaves.
Certiorari denied.

,423 Jack Frost v. Joe Cannon, Judge Of The District Court Of Oklahoma County, State Of Oklahoma.
Petition for rehearing withdrawn at request of petitioner.

,734 Board Of Review For Oklahoma Employment Security Commission v. Hon. William W. Means, Judge Of The District Court Of The 14th Judicial District, State Of Oklahoma.
Application To Assume Original Jurisdiction and Petition For Writ Of Prohibition denied.

,317 Michael Paul Cox v. Kelsey-Hayes Company and Carl-Built, Inc.
Motion to retain held in abeyance pending assignment for adjudication.

,565 Robert W. Johnston v. Corinthian Television Corporation.
National Newspaper Association granted leave to file brief Amicus Curiae on or before February 24, 1978.

,608 Dorothy Thompson and Robert G. Thompson v. Presbyterian Hospital et al.
Appellees granted until March 4, 1978 to file brief, per stipulation of parties.

CL

Pat Irwin

Acting Chief Justice

§1130. Termination of parental rights in certain situations.

"A. The finding that a child is delinquent, or mistreated or neglected, shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:

"1. Upon a written consent of a parent, including a parent who is a minor, acknowledged as provided in 10 O.S. 1961, Section 60.5(5), who desires to terminate his parental rights; or

"2. A finding that a parent who is entitled to custody of the child has abandoned it for one (1) year; or

"3. A finding that a parent who is entitled to custody of the child:

"a. has failed to give the child the parental care or protection necessary for his physical or mental health, or

"b. although financially able, has willfully neglected to provide the child with the necessary support or eduction, or

"c. is unfit by reason of debauchery, intoxication, or habitual use of narcotic drugs, or repeated lewd or lascivious behavior or other conduct that is detrimental to the physical or mental health or morals of the child, and the parent has failed to show that the conditions have been corrected within a period of six (6) months after the child, or children, were adjudged dependent or neglected and a permanent termination of parental custody of the child, or children, is necessary to protect its physical or mental health or morals; provided further, that the court may extend the time in which such parent may show the condition has been corrected, if, in the judgment of the court, such extension of time would be in the best interest of the child or children; or

"4. A finding that a parent, having been ordered to contribute to the support of the child, has willfully failed to contribute during the preceding year.

"5. A finding that a parent has physically abused a child subsequent to having been found guilty of child beating or child abuse either in a criminal action or specifically so found in a child dependency neglect action in a proceeding in the juvenile division of a district court.

"B. However, nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare. Nothing in this act shall be construed to authorize any court to terminate the rights of a parent to a child, solely because the parent, in good faith, provides for his child, in lieu of medical treatment, treatment by spiritual means alone through prayer in accordance with the tenets and practice of a recognized church or religious denomination."

Amended by Laws, 1975, c. 250, § 1, emerg. eff. June 2, 1975.

"Appendix One"

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 20 1977
Ross N. Lillard, Jr.
CLERK

IN THE MATTER OF: KEYES, DERRICK, a child under 18 years of age, to-wit: 2 1/2 years.

No. 49,717

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable Joe Jennings, Judge

Appeal by Appellant natural mother, Ann Keyes, from an order of the Trial Court, confirming the findings and recommendations of the Referee, Juvenile and Family Relations Division, that all parental rights of the natural parents of Derrick Keyes be terminated.

A F F I R M E D

Charles Davis
Tulsa, Oklahoma 74106

For Appellant Keyes

James H. Chafin
Tulsa, Oklahoma 74103

For Appellant Wesley

Donald Lee Ritter
Department of Institutions,
Social and Rehabilitative
Services
Oklahoma City, Oklahoma 73125

For Appellee State
of Oklahoma

"Appendix Two"

BARNES, J.:

This is an appeal by Appellant, Ann Keyes, from an order of the Trial Court terminating her parental rights and those of the natural father, Robert Wesley, to their child, Derrick Keyes, age two and one-half years at the time of the hearing. The natural father appeals in Case No. 49,718, and the natural mother appeals in Case No. 49,717.

The pertinent facts are as follows: The child in question, Derrick Keyes, was living in the care and custody of his natural mother, Appellant Ann Keyes, with the concurrence of Robert Wesley, the child's natural father, who was a sometimes resident of the mother's home. On January 5, 1974, the child was admitted to Hillcrest Hospital in Tulsa, Oklahoma, with severe medical problems, including pneumonia, severe dehydration, vomiting, hypernatremia, and severe anemia.

As a result of subsequent investigation, the State, through the Department of Institutions, Social and Rehabilitative Services (Department), filed a petition in the Tulsa County District Court alleging the aforementioned medical problems were the result of improper care by the child's mother. The child was made a ward of the Court pursuant to a temporary order, with custody in the Department, and later adjudicated a dependent and neglected child, with custody in the Department, pursuant to an order of May 17, 1974, setting a review date for July 17, 1974. Further hearings were held September 4, 1974, and January 8, 1975, at which time custody was continued in the Department.

On March 19, 1975, both parents again appeared before the Court and temporary custody was restored to the natural mother under the Department's supervision and review date set for September 17, 1975. On that date the matter was continued to permit the newly assigned caseworker to become acquainted with the case and to provide the Court with a written report. Hearing was reset for October 1, 1975.

However, on September 20, 1975, Appellant Ann Keyes left the child in Appellant Robert Wesley's care while she went shopping with Mrs. Wesley. Upon return, the child was passing blood in his stool, whereupon Appellants took the child to Oklahoma Osteopathic Hospital, in Tulsa, Oklahoma.

On September 23, 1975, a motion was filed asking that the parental rights of both Appellants be terminated, alleging conditions existing January 18, 1974, had not been shown to be corrected, that on September 20, 1975, Appellant Wesley had assaulted the child, and that permanent termination of parental rights was necessary to protect the physical and mental health and morals of the child.

Temporary custody was again placed in the Department by order of September 23, 1975. Hearings were held before Referee Helen Kannady in Tulsa County District Court, Juvenile and Family Relations Division, on the motion asking that parental rights be terminated. Appellants herein were represented by counsel. The Court Referee found, after hearing testimony and evidence, that the conditions that had existed had not changed, that the child's physical health continued to be in jeopardy, and that it was necessary for the proper care and protection of the child and in his best interests that all parental rights of the natural parents be terminated, and that the child be placed in permanent custody of the Department, with said Department to plan for and consent to the adoption of the child.

The matter came on for hearing before the Associate District Judge presiding over the Juvenile and Family Relations Division of the Court on April 15, 1976, at which time he entered an order stating the Appellants failed to show any prejudicial

rights, to protect the child's physical and mental well-being.

Thereafter, Appellant and Robert Wesley filed their independent appeals before this Court seeking to vacate the Trial Court's judgment and urging that custody of the child be restored to both natural parents.

Appellant Keyes urges as error (1) that she was denied due process under 10 O.S. 1971, § 1130, which she contends is vague and overly broad; (2) that the Trial Court erred in overruling the demurrer to the State's evidence; and (3) that a termination of parental rights is not a permissible dispositional order, and that denial of trial by jury was violative of her constitutional and statutory rights.

Before considering Appellant's allegations of error, we deem it necessary to review the evidence. Medical expert testimony reflects a life-threatening injury to the child which, based upon the doctor's experience and examination of Derrick Keyes, would be consistent with anal abuse. However, medical testimony reveals cultures from specimens obtained in the hospital emergency room in search for sperm, acid phosphatase secretion, etc., were all negative.

A social worker with the Child Abuse Registry of the State Welfare Department testified she examined the child while in the hospital, observing small round sores on the back of one leg and upper arm and a looped scar on his leg. She further indicated no new injuries nor rectal or anal problems had occurred since the child's release from the hospital and while in foster care.

Appellant Keyes testified the child had been bleeding from the rectum before the September 20, 1975, incident and that she had taken him to Moton Health Center three or four times, where the doctor told her the bleeding could have resulted from the child's stool being hard, constipation, or something of that nature.

We will now consider Appellant's allegations of error. It is first contended that 10 O.S. 1971, § 1130, is unconstitutionally vague on its face and has not been sufficiently narrowed by the case law of Oklahoma to cure such vagueness. That statute provides:

> "A. The finding that a child is delinquent, or mistreated or neglected, shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:
>
> "1. Upon a written consent of a parent, including a parent who is a minor, acknowledged as provided in 10 O.S. 1961, Section 60.5(5), who desires to terminate his parental rights; or
>
> "2. A finding that a parent who is entitled to custody of the child has abandoned it for one (1) year; or
>
> "3. A finding that a parent who is entitled to custody of the child:
>
> "a. has failed to give the child the parental care or protection necessary for his physical or mental health, or
>
> "b. although financially able, has willfully neglected to provide the child with the necessary support or education, or
>
> "c. is unfit by reason of debauchery, intoxication, or habitual use of narcotic drugs, or repeated lewd or lascivious behavior or other conduct that is detrimental to the physical or mental health or morals of the child, and the parent has failed to show that the conditions have been corrected within a period of six (6) months after the child, or children, were adjudged dependent or neglected and a permanent termination of parental custody of the child, or children, is necessary to protect its physical or mental health or morals; provided further, that the court may extend the time in which such parent may show the condition has been corrected, if, in the judgment of the court, such extension of time would be in the best interest of the child or children; or
>
> "4. A finding that a parent, having been ordered to contribute to the support of the child, has willfully failed to contribute during the preceding year.
>
> "5. A finding that a parent has physically abused a child subsequent to having been found guilty of child beating or child abuse either in a criminal action or specifically so found in a child dependency neglect action in a proceeding in the juvenile division of a district court.
>
> "B. However, nothing contained herein shall prevent a court from immediately assuming custody of a

"5. A finding that a parent has physically abused a child subsequent to having been found guilty of child beating or child abuse either in a criminal action or specifically so found in a child dependency neglect action in a proceeding in the juvenile division of a district court.

"B. However, nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare. Nothing in this act shall be construed to authorize any court to terminate the rights of a parent to a child, solely because the parent, in good faith, provides for his child, in lieu of medical treatment, treatment by spiritual means alone through prayer in accordance with the tenents and practice of a recognized church or religious denomination."

This Court finds that the issue of constitutional validity of 10 O.S. 1971, § 1130, squarely confronts it. The injuries here are consistent with sustained anal abuse, and negate the possibility of self-injury administered by a two and one-half year old child's physical capabilities.

Appellant places great reliance upon *Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975), affirmed at 545 F.2d 1137 (8th Cir., 1976),* to support the position that 10 O.S. 1971, § 1130, is unconstitutional. In that case the United States District Court for the Southern District of Iowa was presented with a constitutional challenge to the Iowa statute dealing with termination of parental rights. The challenge had been presented in prior proceedings (384 F. Supp. 643), in which the District Court declined to rule thereon until remand by the Circuit Court of Appeals (518 F.2d 1160, 8th Circuit) with an appropriate direction. In holding the Iowa statute unconstitutional, the Alsager Court relied upon (A) its defective vagueness and the fact that the Iowa Supreme Court had never judicially restricted its application; and (B) its failure to accord procedural due process in requiring "clear and convincing evidence" as opposed to the "preponderance standard then in effect."

*Alsager, supra,* declared the Iowa Statute, Code of Iowa, § 232.41, overly vague, both on its face and as applied to the Alsagers. The Court found that neither the case law nor the way in which the law had been applied in that case had sufficiently narrowed the statute and defined the standard of necessary parental care and protection. The Court said:

> "In sum, the Iowa parental termination standards of 'necessary parental care and protection' and of '(parental) conduct . . . detrimental to the physical or mental health or morals of the child,' are unconstitutionally vague, both on their face and as applied, in that (1) they do not, and did not here, give fair warning of what parental conduct is proscribed, (2) they permit, and permitted here, arbitrary and discriminatory terminations, (3) they inhibit, and inhibited here, the exercise of the fundamental right to family integrity. * * * "

The Iowa Court said standards of "necessary parental care and protection," § 232.41(2)(b), and of "parental conduct . . . detrimental to the physical or mental health or morals of the child," § 232.41(2)(d), are susceptible to multifarious interpretations, which prevent the ordinary person from knowing what is and is not prohibited. The Iowa Court noted that a reading of the petition and the termination statute would not have given the Alsagers notice of what they were doing wrong, i.e., they were not given a factual basis from which to predict how they should modify their past conduct, their "parenting," to avoid termination.

We are not persuaded by the *Alsager case, supra,* nor the reasoning of *Roe v. Conn, 417 F. Supp. 769 (N.D. Ala. 1976),* which found a statute on child neglect unconstitutionally vague, adopting the reasoning and language of *Alsager, supra,* which requires the State to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the State is justified

in terminating the parent-child relationship.

We agree with Appellants that the terms such as "care and protection necessary for the child's physical or mental health" are terms about which men and women of ordinary intelligence may disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views, and to that extent such terms are vague. However, in our view, we do not find the statute unconstitutionally vague and overly broad nor couched in terms that have no common meaning.

We observe the Oklahoma termination statute, unlike that of Iowa, requires that the State grant parents six months at a minimum to correct the conditions found to be true as to neglect, 10 O.S. 1976 Supp., § 1130(A)(3)(a).

We also note that in the instant case, in both the original petition filed January 18, 1974, and the motion regarding termination filed September 23, 1975, both the factual basis for termination and the legal standards permitting same were set forth clearly and precisely and that Appellants had adequate and fair warning of what parental conduct was found to be at issue -- care and protection necessary for the child's physical health.

Appellant Keyes next raises the issue that her demurrer to the State's evidence was improperly overruled by the Trial Court. She argues that the record fails to show that any of the allegations of the State's petition filed January 18, 1974, existed on September 23, 1975, when the State filed its motion to terminate parental rights, alleging Keyes had failed to correct the conditions which resulted in the child's adjudication as dependent and neglected, after the six-month statutory period.

In determining whether a demurrer to the evidence should be sustained, the Trial Court should consider as true all evidence

orable to the party against whom the demurrer is directed, all inferences that may be reasonably drawn from such evi-ce, and disregard all evidence favorable to the demurrant. *gall v. Davis, 280 P.2d 706 (Okl. 1955); Nye v. Cox, 440 P. 683 (Okl. 1968).* Based upon the motion, allegations and dence in the record, we think the Trial Court properly over-ed Appellant's demurrer.

Finally, Appellant Keyes argues that the denial of al by jury in the termination proceedings was violative her constitutional and statutory rights. This question s recently considered by this Court in *J.V. v. State of Okla-ma, Department of Institutions, Social and Rehabilitative rvices, and L. E. Rader, Case No. 48,897, 48 O.B.J. 2636, ____P.2d _____ (Okl. 1977),* and determined contra to Appel-nt.

AFFIRMED.

DGES, C.J., LAVENDER, V.C.J., and DAVISON, IRWIN, and BERRY, ., concur.
LLIAMS, SIMMS and DOOLIN, JJ., dissent.

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| : MATTER OF: KEYES, DERRICK, ld under 18 years of age, : 2-1/2 years. | ) ) ) | No. 49,717 |

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 20 1977
Ross N. Lillard, Jr.
CLERK

DISSENTING OPINION

, J:

There are two issues presented by this appeal. The first ether the procedure by which appellant's parental rights were nated denied her "fundamental fairness" as guaranteed by pro- al due process. The second is whether the standards of parental ct proscribed by 10 O.S. 1971, § 1130 are unconstitutionally .

The majority opinion overlooks the first issue and, in de- ng the second, holds the statute constitutionally specific and se. I must respectfully dissent. I believe that proper resolu- of either issue requires reversal of this action.

In affirming this judgment, the majority sanctions a mode of inating parental rights which:

(1) relieves the State of carrying its burden of proving by clear and convincing competent evidence that the facts are statutorily sufficient to support an order of termination; and

(2) places upon the parents the burden of disproving the sufficiency of facts necessary to support an order of termination; and

(3) permits the State to "bootstrap" its termination proceeding upon the circumstances which originally led to a child's adjudication even though those circumstances no longer exist and are unrelated to the facts upon which the termination action is based; and

(4) allows incompetent evidence to be introduced in support of termination by designating the proceeding as a mere "dispositional" hearing of the original adjudication; and

(5) denies parents the mandatory six month "grace period" to effect a change of conditions, even though this statutory six month provision was found by the majority to be the essential factor distinguishing our statute from the unconstitutional Iowa statute.

A short summary of the facts of this case illustrates these
s.

Derrick was first brought to the attention of the court by
ion filed on January 18, 1974, which alleged that he was a
nt and neglected child by reason of his mother's failure to
him with adequate nutrition and medical care and that as a
of her alleged failure, he was suffering from hypernatremia
ere anemia. (For convenience, these conditions will be
d to as "Facts A.) The petition did not seek termination of
nt's parental rights. The petition further alleged that
's father was unknown. Hearing was subsequently held and,
ipulations and admissions of appellant, the court found the
ions "true as to the mother's interests." Derrick was
ated a dependent and neglected child, made a ward of the court,
ced in the custody of the Department. Although Robert Wesley,
ant in companion case No. 49,718) did appear personally before
rt, the matter of his interests was set off and never adjudi-
He was neither alleged, nor found, to be responsible in any
Derrick's health problems.

Later in March of 1975, the court ordered Derrick's custody
ed to appellant under supervision of the Department based upon
ing that this change of custody would be in his best interests.
Then, on September 23, 1975, following Derrick's hospitaliza-
or rectal bleeding, an unverified motion to terminate the ap-
t's parental rights was filed. While it is my opinion that an
ed motion is not sufficient to vest the court with jurisdiction
ermine the issue of termination, inasmuch as 10 O.S. 1971, § 1103
es a verified petition, I shall not further belabor that point
My views on this issue are fully set forth in my Dissenting
n in *J.V. v. State of Oklahoma, Department of Institutions, Social and Rehabilitative Services, Okl.*, 48 OBJ 2639, ____P.2d ____ (November 26, 1977).

The substance of the motion alleged that:

" * * *[Derrick] is 2-1/2 years of age, declared and adjudged to be dependent-neglected on January 18, 1974. That Robert Wesley and Ann Keyes are the natural father and mother of said child and, after

*at least six (6) months since the adjudication of said child, have failed to show that the conditions which resulted in the dependency-neglect of said child have been corrected.*

On or about 9/20/75, while in the care of said natural father, said child was assaulted and suffered a perforated colon, severely lacerated rectum, five small lesions on the back of his right thigh; said natural mother placed said child in the care and control of said natural father, and said father either assaulted said child, resulting in the aforementioned injuries, or failed to protect said child from said injuries; due to the above circumstances, said child underwent surgery on 9/20/75 and is currently residing at the Oklahoma Osteopathic Hospital, Tulsa, Oklahoma.

That permanent termination of the parental custody of said child is necessary to protect his physical and mental health and morals."

Hearing was held and the State presented four witnesses in of its motion. Each witness testified about Derrick's hospation for rectal bleeding on September 20, 1975, and his ent condition. (The facts brought forth at this hearing will rred to as "Facts B".) Appellant objected to this testimony lated to the motion's allegation that termination was being because the parents had not, after at least six months, corrected ditions ("Facts A") which resulted in Derrick's adjudication on 18, 1974. These objections were overruled as was appellant's r to the evidence.

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ause of the Referee's ruling that the termination hearing
a "dispositional" hearing which did not need to be con-
er the rules of evidence, the State was allowed to introduce
t evidence and opinions against appellant. The most flagrant
rank hearsay that I have ever observed on either the trial
te bench, was permitted - the assistant district attorney
g the case was allowed, over appellant's objections, to take
and testify as a rebuttal witness against appellant as to
of Derrick's doctors had told him about Derrick's condition.
Referee found that existing conditions had not been cor-
d that appellant's parental rights should be terminated.
r was subsequently confirmed by the Juvenile Judge.
e burden of proof in a termination action is, of course, on
seeking to obtain it,[1] here, the State of Oklahoma.



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., Application of Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed 2d 517 (1969);
Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed 2d 551 (1972); Alsager v.
ourt of Polk County, Iowa, supra; In Interest of Hochmuth, Ia., 251 N.W.2d
; In re Sego, Wash., 513 P.2d 831 (1973); In re Welfare of Larson, Minn.,
325 (1977).

The State did not prove by clear and convincing competent evidence at either hearing that the facts warranted and necessitated terminating appellant's parental rights. The first hearing did not involve termination; the only issue was whether, by reason of "Facts A", Derrick was a dependent and neglected child. At the second hearing which concerned the motion to terminate, the State was relieved of its burden of proof because that hearing, although concerned with "Facts B", was treated as a dispositional hearing of the original adjudication.

Neither this appellant nor appellant Wesley were allowed the mandatory six month period within which to change conditions and prevent the termination order from issuing. As termination was not sought in the first proceeding as to either parent (it should be remembered that appellant Wesley was not even part of that proceeding), it could hardly be said that they had a period of six months to prevent that which could not occur. In fact, Derrick's mother did correct those conditions and Derrick's custody was returned to her.

Nonetheless, when the State subsequently decided to seek termination because of "Facts B" (Wesley's alleged abuse) the motion to terminate recited that the action was based on the failure of the "father and mother . . .after at least (6) months since the adjudication . . . to show that the conditions which resulted in the dependency-neglect . . . [had] been corrected."

This allegation obviously resulted from the State's attempt to come within the six month provision of § 1130 (a)(3)(c) and thereby establish statutory grounds for termination.

This statute was never meant to be applied to the facts before us in this peculiar manner which results in constitutionally deficient procedure.

The provisions in question read:

> "A. The finding that a child is delinquent, or mistreated or neglected, shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:
>
> * * *
>
> "3. A finding that a parent who is entitled to custody of the child:
>
> "a. has failed to give the child the parental care or protection necessary for his physical or mental health, or

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"b. although financially able, has willfully neglected to provide the child with the necessary support or education, or

"c. is unfit by reason of debauchery, intoxication, or habitual use of narcotic drugs, or repeated lewd or lascivious behavior or other conduct that is detrimental to the physical or mental health or morals of the child, and the parent has failed to show that the conditions have been corrected within a period of six (6) months after the child, or children, were adjudged dependent or neglected and a permanent termination of parental custody of the child, or children, is necessary to protect its physical or mental health or morals; provided further, that the court may extend the time in which such parent may show the condition has been corrected, if, in the judgment of the court, such extension of time would be in the best interest of the child or children;

* * * "

There is only one sensible and constitutional construction of this statute. It is this: the statute presupposes that termination of parental rights was sought at the adjudicatory hearing, that the matter was tried and the matter resolved adverse to the parents. In other words, the statute contemplates termination as a remedy for conditions detrimental to a child's well being only from an adjudicatory proceeding in which those issues have been tried.

The statute takes for granted that before parental rights are susceptible to termination for the parents' failure to show that conditions were corrected within six months after the child was adjudicated dependent and neglected, the following had already occurred:

(1) a verified petition was filed which sought to have the child adjudicated dependent and neglected and prayed for termination of parental rights (10 O.S.1971, § 1103); and

(2) the parents were given notice that termination, as well as the child's adjudication as dependent and neglected, would be an issue of the proceeding (10 O.S.1971, § 1131); and

(3) the issues involved in termination, as well as dependency and neglect were heard; and

(4) the State bore its burden of proof on the issues and showed by clear and convincing competent evidence that termination of parental rights was warranted under the statute and necessary for the child's welfare; and

(5) the court decided the issues adverse to the parents; and

(6) the court advised the parents that because of their certain specified conduct, the child was a dependent and neglected child under the laws of Oklahoma; and

(7) that the facts supported and necessitated terminating their parental rights at that time; but that

(8) the law grants parents a period of six months to attempt to correct those behaviors which are found to be intolerably detrimental to the child; and

(9) that they had a period of six months to correct those specific conditions and come back before the court with proof that the conditions had been corrected; and

(10) that the burden now shifted to them to correct those conditions and to come before the court within six months to show that change, or an order terminating their parental rights would be entered at the expiration of that period.

So where, as in the instant case, termination of parental rights is sought subsequent to a child's adjudication, the action for termination cannot be bootstrapped into the scope of § 1130 merely by the existence of that prior adjudication. This is true whether or not the conditions which resulted in that adjudication were changed by the parents. The sufficiency of the facts to support termination must stand or fall on its own merit. Parents of a child who was for some reason previously adjudged a dependent and neglected child, are entitled to no fewer constitutional and statutory protections than surround those parents who are threatened with termination the first time their child comes to the court's attention.

The mechanics of the requisite procedure are simple. When the State decides to seek termination of parental rights and the child concerned was previously adjudged dependent or neglected, a new verified petition must be filed seeking to have the child declared dependent and neglected under current conditions. It should, of course, set forth those conditions with particularity, further alleging that those conditions support and necessitate termination of parental rights and it must pray for that remedy. If, after notice and hearing, that issue is determined adverse to the parents, they must be granted the statutory period of six months to attempt to correct those conditions which were found by the court to have an intolerable affect on the child. This is no more than the State must do to obtain termination when a child has not been previously adjudicated.

The construction given the statute by the trial court, and sanctioned by the majority's affirmance, creates absurd as well as unconstitutional results. Every dependency and neglect action - even

though termination was not sought and the matter has been long since resolved to everyone's (including the court's) satisfaction - forms the statutory basis for a later (1, 5, 8, or 18 years) action by the State for termination by mere allegation that the parents did not correct the conditions which resulted in that adjudication. This is so even though the parents had no notice that:

there were certain conditions which they needed to correct; or

that if they didn't correct them their parental rights could be terminated; or

that the burden of proof was on them, not the State.

Besides shifting the burden of proof to the parents, allowing incompetent evidence to be introduced against them and denying them the mandatory six-month grace period, the trial court also denied them of a trial by jury. I believe that they had a fundamental right to a trial by jury which is assured by the Oklahoma Constitution, Art. 2, § 19 and 10 O.S. 1971, § 1110. See, Dissenting Opinion, *J.V. v. State of Oklahoma, Department of Institutions, Social and Rehabilitative Services*, supra.

Additionally, I cannot agree with the majority that § 1130 (A)(3)(c) sets forth standards of proscribed parental conduct with constitutionally sufficient precision. It is virtually identical to the statute struck down for vagueness in *Alsager*, *supra*. Nor, as discussed above, do I believe the statute was applied to appellant in a constitutionally permissible manner.

The majority concedes that "terms such as 'care and protection necessary for the child's physical or mental health' are terms about which men and women of ordinary intelligence may disagree." And, that "[t]heir answers would vary in large measure in relation to their differing social, ethical and religious views ..." This subjectivity is, of course, the very heart of the danger of vague laws.

Our statute suffers the same "void for vagueness" problems found in the statutes struck down in *Alsager*, *supra*; *and Roe v. Conn.*, *417 F.Supp. 769 (N.D.Ala.1976)*. We ould cure these problems by a restrictive construction. We have never attempted to narrow the statute (see e.g., *Carnigan v. State, Okl., 469 P.2d 656 (1970). In re Bower, Okl., 490 P.2d 1076 (1971); In re Wright, Okl., 524 P.2d 790 (1974); Cotter v. Hunter, Okl., 540 P.2d 1169 (1975)*), and the majority rejects the opportunity to do so here.

This dissent should not be construed to suggest that Derrick should be returned to his mother's custody. There is no doubt that the record before us supports removing him from her custody and placing him in a protective environment at this time. Neither should this dissent be taken as advocating the notion that abuse of a child is not a sufficient ground upon which to terminate, finally and irreversibly, parental rights, where that action is properly brought and prosecuted.

The only point of this dissent is that if and when termination of parental rights is accomplished, it must be done in a lawful manner that is in accord with our statutes and consistent with the Constitution.

This guarantee of lawful action is absolutely imperative whether we are concerned with wonderful or terrible parents. We must not allow the facts of this case to overwhelm us so that we err in our construction and application of the law. For the truth is that today we create a rule of law which, by the nature of our legal system, will apply to every citizen as fully as it does to Derrick's parents. If we determine that they need not be afforded constitutional rights and statutory protections, then those rights and protections may be withheld from all of us. I am reminded of Justice Frankfurther's following observations on this point in his eloquent dissent in *United States v. Rabinowitz*:[2]

> "The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise. * * *
>
> "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them."

I would reverse the trial court's order terminating appellant's parental rights, leaving the order placing Derrick's temporary custody with the Department in full force and effect.

I am authorized to state that Justice Williams and Justice Doolin join with me in this dissent.



2. 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed 655 (1950).